In the United States Court of Appeals for the Ninth Circuit

HANFORD ATOMIC METAL TRADES COUNCIL, AFL-CIO, and C. L. WILLIAMS,
Appellants,

vs.

GENERAL ELECTRIC COMPANY,
a corporation,
Appellee.

NO. 19939

APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PETITION FOR REHEARING

CRITCHLOW, WILLIAMS & RYALS
Attorneys for Appellants
1177 Jadwin Avenue
Richland, Washington

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Comes now appellant Hanford Atomic Metal Trades Council, by its attorney, David E. Williams, of Critchlow, Williams and Ryals, and respectfully petitions the Court for re-hearing of the decision herein filed November 27, 1965. In support of this petition, appellant represents to the Court:

1. Appellant union and appellee employer were parties to a collective bargaining agreement which provided for lay-offs by seniority; they became involved in a dispute regarding application of such agreement to a situation wherein the employer temporarily laid off a large number of workers, at a time when others, with *less* seniority, were on the job.

2. The dispute aforesaid was formalized by appellant's written grievance, which was lodged with appellee under the terms of the agreement hereinabove referred to. This grievance said:

> "The Council (appellant) herewith files a Step II General Grievance against General Electric Company based on current 'furlough' of bargaining unit employees without proper regard for their seniority. This grievance is filed on behalf of all employees so 'furloughed'. By way of remedy, the Council claims full back pay for all of the employees mentioned; with respect to those employees whose vacations have been rescheduled in lieu of 'furlough' out of seniority, the Council demands restoration of all vacation

time so sacrificed without loss of pay in the premises."

Appellee replied to the grievance by written answer and thereby denied any violation of the agreement aforementioned, whereupon the matter was agreeably referred to binding arbitration.

3. At the outset of the arbitration hearing, appellant carefully supplemented its written grievance with an additional written statement which it served, at that time, upon the appellee and the arbitrators. This supplementary written statement said:

> "... The union (appellant) contends that those people who were forced off the job without pay, pursuant to the Employer's direction, while other employees with less seniority than they were on the job are entitled to back pay ...
>
> "... Reference to the Employer's records will reveal those employees who lost time and pay in the premises while others in their classifications with less seniority than they were working. Such lost pay should be restored. *This is the relief requested by the Union.*"

4. At the arbitration hearing and in the post-hearing briefs, appellee failed to argue or otherwise comment with regard to the relief so requested by the appellant; indeed, appellee remained wholly silent on the question of "damages", and confined its argu-

mentative effort to a denial that the agreement aforesaid had been breached.

5. Thereafter, the arbitration committee duly returned its written award which stated flatly that:

> "AWARD. The submitted grievance is *sustained in its entirety* in accordance with the foregoing Opinion and Findings."

6. Subsequent to such Award, appellant demanded "full back pay" from appellee for those employees "who lost time and pay while others in their classifications with less seniority than they were on the job." Appellee refused this demand and paid back wages only to those laid-off people who, in appellee's unilateral opinion, formed some nine months after the fact, *would have been* allowed to remain on the job *had the contract not been breached.* In other words, appellant, in requesting full back pay, constructed the Award to mean that the *rights of the parties were to be measured by the facts at the time of the layoff;* appellee, on the other hand, constructed the Award to mean that the rights of the parties could be measured "*in retrospect and by hindsight.*"

7. The District Court found, in effect, that the original Award did not make it clear whether the rights of the parties were to be measured by the facts

in existence at the time of the layoff, as appellant contended, or "in retrospect and by hindsight," as appellee contended. The District Court remanded the Award to the arbitrators who, in a second Award, sustained the appellee's construction of the first Award and judgment was then entered by the District Court confirming the second Award. This appeal ensued, appellant contending that the original Award was enforceable in accordance with appellant's construction thereof. This Court ruled for appellee on November 27, 1965.

8. It is plain that the sole issue before the Court is whether or not the original award unequivocally provided that the rights of the parties thereunder were to be measured by the undeniable facts *at the time of layoff*. If so, appellants' demand of full back pay from appellee for all those employees, "who lost time and pay while others . . with less seniority were working", is undeniably well taken. This is so for the reason that appellee's construction of original Award and payments made in accordance therewith necessarily required *retrospective* calculations based on a most liberal application of speculative *hindsight*.

9. It is therefore most important, we submit, that careful attention be accorded the following language

appearing in the arbitrators' written Opinion which accompanied the first and original Award:

> ". . The evidence in the record is uncontradicted that *at the time the layoff was made* on April 8, 1962, it was for an indefinite period. It is only *in retrospect* and *by hindsight* that it is determined that the layoff was for a period of one week. *The parties' rights are to be measured by the facts at the time of layoff.* And given this fact and condition, it follows from the section's negotiated language that *at the time of these layoffs* certain rights accorded by the section arose in favor of the senior employees, namely the right to be laid off *only* by seniority." (Page 23, Ex. I-9)

10. It seems to us that the foregoing quotation from the original Opinion and Award pointedly forecloses any ambiguity relative to the right of senior men to receive back pay if they were, *in fact*, off the job while junior men were working. In the language of such Opinion, their "*rights are to be measured by the facts at the time of layoff.*" That their rights were *not* so measured, is completely beyond argument. Appellee does not deny that junior men were, *in fact*, on the job and working at a time when senior men, from whom it withheld pay, were, *in fact*, laid off.

11. By reason of the foregoing, appellant respectfully requests rehearing in this appeal.

Respectfully submitted,

David E. Williams, of
CRITCHLOW, WILLIAMS & RYALS
Attorneys for Appellants

CERTIFICATE OF COUNSEL

The undersigned certifies that he has examined the pertinent provisions of the Rules of this Court, that in his opinion this Petition for Rehearing complies with the Rules and that it is well founded in law and is not for the purpose of delay.

David E. Williams